UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 34

In the matter of: Connecticut Light and Power Company d/b/a Eversource Energy and International Brotherhood of Electrical Workers, Local 420	Case No. 01-CA-169804

BRIEF ON BEHALF OF COUNSEL FOR THE GENERAL COUNSEL
TO THE ADMINISTRATIVE LAW JUDGE

Before: Raymond Green, Administrative Law Judge

Respectfully submitted,

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I. SUMMARY OF CASE

This case is about an employer's refusal to provide certain relevant and necessary information to a union during contract negotiations as well as its failure to provide other information in a complete or timely manner.

The International Brotherhood of Electrical Workers (IBEW) Local 420 (the "Union") and the Connecticut Light & Power Company d/b/a Eversource Energy (the "Respondent") have a longstanding bargaining relationship. The Union and Respondent began negotiations for their most recent collective-bargaining agreement in December 2015. In anticipation of those negotiations, the Union made two written information requests to Respondent: on December 7, 2015, and December 8, 2015. Throughout contract negotiations, the Union reiterated its need for the requested information orally at the bargaining table, as well as by letter dated February 1, 2016. However, the Respondent provided nothing in response to several requests, and provided other information months after the Union made the requests.

Specifically, Respondent provided nothing in response to several requests for presumptively relevant information. In letters dated December 7, 2015 and December 8, 2015, the Union requested a breakdown of employee fringe benefits, current working schedules, manpower requests (or personnel vacancy requests, which comprise the first step in a process to fill a vacant bargaining unit position), and an accurate list of employees on special rates. It is undisputed that Respondent provided none of this information.

For other requests, Respondent provided incomplete or inaccurate responses to information that was relevant to the Union's role as bargaining representative. In letters

dated December 7 and December 8, 2015 and February 1, 2016, the Union asked for meal reimbursement information, Respondent's organizational charts, job descriptions, the names of contractors hired by Respondent to perform bargaining unit work, and the hours and costs of those contractors. Although Respondent provided some of this information, there is no dispute that the information was incomplete. There is also no dispute that Respondent never provided any of the requested cost data for contractors.

Moreover, Respondent unreasonably delayed furnishing information to the Union. As will be explained below, much of the information that Respondent did provide was not provided until several months after the Union's initial requests.

Finally, Respondent has argued that since the parties reached a successor collective-bargaining agreement, the Union no longer needs the requested information, thus making the production of information moot. As will be explained below, all of Respondent's arguments lack merit. The Union has a continuing need for the requested information, and an order requiring its production is the only appropriate remedy.

II. STATEMENT OF THE CASE

The charge in this case was filed by the Union on February 17, 2016, culminating in the issuance of a Complaint and Notice of Hearing dated May 31, 2016 ("Complaint") (GCX-1(c)).[1] The Complaint alleges that Respondent violated Section 8(a)(5) of the Act by (1) failing and refusing to provide the Union with information that was requested by letters dated December 7, 2015, December 8, 2015 , and February 1, 2016, and (2) unreasonably delaying the furnishing of requested information.

[1] Reference to the Transcript will be made by "Tr." followed by the page number(s). Where several witnesses testify on an important point, the witness name may be added. Reference to the General Counsel's exhibits will be designated by "GCX" followed by the exhibit number. References to Respondent's exhibits will be designated by "RX" followed the exhibit number. Reference to joint exhibits will be designated by "JTX" followed by the exhibit number.

On June 10, 2016, Respondent filed a timely Answer to the Complaint in which it generally denied the commission of any unfair labor practices, but admitted that during the relevant 12-month period ending April 30, 2016, Respondent had derived gross revenues in excess of $250,000, and purchased and received goods valued in excess of $50,000 at its Connecticut facilities directly from points located outside the State of Connecticut. (GCX-1(e).) In Respondent's Answer, it admitted that the Union is a labor organization within the meaning of Section 2(5) of the Act at all relevant times. (GCX-1(e).) Respondent also admitted that Joseph Picone, Manager of Labor Relations, was a supervisor within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act. (GCX-1(e).)

On September 7–8, 2016, a hearing was held in Hartford, Connecticut before Administrative Law Judge Raymond Green. At the hearing, Counsel for the General Counsel amended the Complaint to add subparagraph 9(i) "current working schedules." (GCX-2.) This is Counsel for the General Counsel's brief in support of the Complaint allegations.

III. FACTS

A. Respondent's Operations

Respondent is a public utility company providing commercial and residential electric power to customers in the State of Connecticut and maintaining electrical poles to distribute electricity to its customers. (Tr. 32, 43.) Respondent also has facilities and property outside the state, none of which are at issue here. (Tr. 50.) Respondent is an employer within the meaning of § 2(2), (6), and (7) of the Act. (See Tr. 9.)[2]

[2] The allegation that Respondent is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act at all relevant times was inadvertently omitted from the Complaint. There is no

B. Prior Collective-Bargaining Agreements and Contracting Out of Bargaining Unit Work

Within Connecticut, the Union and its sister local, IBEW Local 457 ("Local 457") represent certain employees of Respondent.[3] Both unions were parties to two previous collective-bargaining agreements with Respondent, known as the "Green Book" (JTX-2) and the "Blue Book" (JTX-1), which covered numerous bargaining units (collectively, the "Units")[4] and were effective from June 1, 2012 to June 1, 2016. (Tr. 8.) Among the bargaining unit positions in the Green and Blue Books are the following job positions: Troubleshooters, Linemen, Electricians, Meter Service, Storeroom, and Building Maintenance or Janitorial. (Tr. 31.) Linemen set new electrical poles, run wires through Respondent's electrical poles, hang equipment on those poles, and install capacitors and regulators, among other tasks. (Tr. 33.) Electricians program the equipment that the Linemen install on the poles so that the electricity properly runs through the system. (Tr. 36.) A Troubleshooter is a kind of Lineman who responds to unplanned issues that arise with the electrical lines, such as restoring power during emergency situations or making other repairs on an as-needed basis. (Tr. 31, 34; see, e.g., JTX-1 at 59–62 and JTX-2 at 140 (discussing Troubleshooters and/or Trouble Calls).) Troubleshooters receive higher pay than regular Linemen. (Tr. 32; see, e.g., JTX-1 at 94, 107, 120, 133, and JTX-2 at

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dispute that Respondents sufficiently engaged in commerce, and the record supports a finding that Respondent is an employer for the purposes of the Act.

[3] In general terms, the Union represents employees on the western half of Connecticut, while Local 457 represents employees on the eastern half of Connecticut. (Tr. 179.) Only the Union is the Charging Party here.

[4] "Appendix A" of the Blue Book (JTX-1) contains a list of the Union-represented job classifications to which that contract applies. (JTX-1 at 1, 89–140.) The Green Book contains several bargaining units that are apportioned geographically and (JTX-2 at 1–8, 12–23). A list of the job categories covered by the successor contract known as the "Teal Book" can be found in "Appendix A" of JTX-3 (at pp. 49-66) and a description of the bargaining units can be found on pages 1–8.

94, 104, 114, 124 (listing wages for Troubleshooters).) Meter Service employees wire current transformer cabinets, which measure electrical currents. (Tr. 38.) The Storeroom employees refurbish equipment and take inventory of equipment that other employees use. (Tr. 38.) Building Maintenance or Janitorial employees maintain Respondent's facilities. (Tr. 38.)

It is undisputed while that the Blue and Green Books were in effect, Respondent hired third-party contractors to perform some of the bargaining unit work in the job classifications listed above. (Tr. 39.) Both the Blue and Green Books contained language regarding the contracting of third parties. For example, Article XVI Section 1 of the Blue Book, "Contract Work," provides in part that:

> Work regularly performed by employees covered by this Agreement will not be contracted out if it would result in loss of continuity of employment or opportunities for permanent promotions to job classifications covered by this Agreement.

(Tr. 183; JTX- 1 at 80.) Similarly, Article X, Section 10 of the Green Book, "General Provisions," states that:

> The Company agrees that it will not have work done by contract which is usually done by employees where such contracts will be accompanied by a layoff or reduction of hours in the working schedule or where men capable of doing the work are on layoff, have recall rights, and are readily available. Where contractors employing I.B.E.W. members are readily available and qualified to perform such work, they will be given any contract involving live wire work, to the extent permitted by law, and, all things being equal, will be given preference for other work usually done by employees, to the extent permitted by law.

(JTX-2 at 88; see Tr. 184.) Over the years, numerous contractors (such as KTI, MTV, Boulos, MJ, Diversified, Guidant, and Par, to name a few) performed various types of bargaining unit work. (Tr. 41-43, 176, 224.) Although Union-represented Troubleshooters performed troubleshooting work during the first shift, since around May

2014 Respondent has hired a company called Asplundh to perform Troubleshooters' work during the second and third shifts. (Tr. 25–26.)[5]

On December 10, 2015 and continuing throughout the spring of 2016, Respondent and the Union negotiated a successor contract that, among other things, combined and modified the previous contracts into a single contract (the "Teal Book"). (Tr. 18–20; JTX-3.)

C. Negotiations in 2015–16 for a Successor Contract

Respondent and the Union began negotiations for a successor agreement on December 10, 2015, and met almost every Tuesday and Thursday through the end of May 2016, in addition to holding side-bar meetings, subcommittee meetings, and caucuses each week. (Tr. 19, 77, 117, 248.) Respondent's lead negotiator was its Manager of Labor Relations, Joseph Picone. (Tr. 248.) Picone was joined by several other representatives for Respondent, including Gary Martell, a labor relations consultant who works for Picone. (Tr. 24.) For the Union, those present included the current Business Manager Joe Malcarne[6], Frank Cirillo[7], and Ed Collins, an International Representative for IBEW. (Tr. 65, 248.)

Respondent opened the negotiations with a proposal to merge the Blue and Green Books into a single contract, and to include an agreement with the Union to handle the troubleshooting work on the first, second, and third shifts. (Tr. 25, 317; GCX-17.) The parties bargained over the job duties, training, qualifications, wages, benefits,

[5] Asplundh employs members of another union, IBEW Local 42, to perform the trouble work for Respondent. (Tr. 177, 191.)

[6] Malcarne was the Union's Recording Secretary and Assistant Business Agent at the time. (Tr. 18, 179.)

[7] Frank Cirillo passed away in April 2016. Until that time, he served as the Union's Business Manager. (Tr. 20, 179.)

and other aspects of a newly proposed "Response Specialist" position throughout the Winter and Spring of 2016. (See Tr. 25, 163, 169, 196, 199.) The Union and Respondent also discussed a wide range of other typical subjects of bargaining, including proposals about minimum staffing levels, potential changes to the job duties or descriptions of current job classifications, and modifying employee benefits, among other topics. (Tr. 168, 216, 219, 220, 225.)

D. The Union's Information Requests

1. The December 7 and 8, 2015 Letters

To prepare for contract negotiations, the Union submitted two initial information requests. On December 7, 2015, Frank Cirillo and John Fernandes[8] jointly sent a letter (the "December 7 Letter") to Picone, containing a list of nine information requests[9] for the upcoming negotiations:

1. Contractor list for period June 1, 2013 to present.
2. Address list for bargaining unit employees.
3. 2013, 2014, and 2015 Fringe Benefit Breakdown.
4. Straight-time hourly rate and 1% of annual pay.
5. Expense plan breakdown 2013 – 2015.
6. Shift premium cost and Summary Premium cost 2013 – 2015.
7. Number of meals and Meal Reimbursement cost 2013 – 2015.
8. List of all employees currently on special rates – Article V/Red Circle (Blue)
9. Current working schedules.

[8] John Fernandes is the Business Manager for Local 457.

[9] Items 2, 4, 5, and 6 are not at issue in this case, as there is no dispute that the Union was satisfied with the timeliness and completeness of Respondent's response to those requests.

(Tr. 20; JTX-5.) The December 7 Letter is nearly identical to a prior information request that the Union submitted to Respondent in advance of negotiations that resulted in the Green and Blue Books in 2012.[10] (GCX-19; Tr. 331.) Item 1 of the December 7 Letter sought information regarding contractors who were performing bargaining unit work. (Tr. 38.) Items 3 through 9 sought information regarding the wages, benefits, hours and working conditions of employees in the Units. (Tr. 93–94.)[11]

On December 8, 2015, Malcarne, drafted another letter (the "December 8 Letter") jointly sent by the Union and Local 457. (Tr. 31; JTX-6.) The December 8 Letter contained a list of five information requests for the upcoming negotiations:

1. All contractor hours and costs (dollars) of any and all contractors used to perform the work for the following classifications for the years 2012, 2013, 2014, 2015 and once 2016 begins, keep the information updated on an end of month cycle:
    a. Troubleshooters
    b. Linemen (including Transmission Linemen)
    c. Electricians (including General Operating)
    d. Meter Service
    e. Storeroom
    f. Building Maintenance / Janitorial
2. The names of all contractors mentioned above.
3. Organizational Charts.
4. Present Job Descriptions[.]

[10] In prior contract negotiations around 2012, the Union had requested contractor hours and costs to prepare for making wage and benefit proposals during negotiations, and Respondent had provided that information. (Tr. 44; see also GCX-20.)

[11] From both Malcarne's testimony and Picone's, it was clear from the circumstances surrounding the request that items 2 through 9 were understood to refer to employees in the Units. (See Tr. 251–52.) Respondent never questioned the scope of those requests, nor did Respondent ask that the Union narrow or clarify its requests. (See, e.g., Tr. 23, 56, 74, 87-88, 94.)

5. All manpower requests for 2012, 2013, 2014, and 2015 (PVR's).

(JX-6; Tr. 31.) This second letter also sought information pertaining to members of the Union-represented bargaining units or work performed by Union-represented employees. (Tr. 38.) It is undisputed that the job titles listed in request 1(a) through 1(f) were job classifications in the Units. (Tr. 38.) It is also undisputed that Respondent had used contractors to perform some amount of the work normally assigned to employees in those job classifications. (Tr. 39–40.) Moreover, it is undisputed that, regarding some of that work (particularly the trouble work), Respondent had spent significantly more on contractors than it would have cost to use Unit employees under the Green and Blue Books. (Tr. 192–93; 264.)[12] Thus, Respondent's proposal to create a "Response Specialist" position, and to have Unit employees perform all or part of the trouble work would likely result in significant (albeit so-far undetermined) savings to the Employer. (See Tr. 195.)

On December 10, 2015, the first day of negotiations, Picone acknowledged receipt of the December 7 and December 8 Letters. (Tr. 20.) Malcarne testified that on the first day of negotiations, Picone said that he received the Union's information requests and understood them. (Tr. 20.) There is no evidence in the record that Picone raised any questions regarding the relevance, scope, or appropriateness of the information requests contained in the December 7 and 8 Letters prior to the Union's

[12] During cross examination, Malcarne agreed with Respondent's counsel that Respondent had represented to the Union that it had been more expensive to use Asplundh instead of Unit employees to perform trouble work. (Tr. 192–93.) Malcarne stated that he had been told that the contractors cost "400 to 500 times the cost of [Respondent's] employees." (Tr. 192.) It seems more probable that Malcarne meant 400 to 500 *percent*. Nevertheless, the general premise seems undisputed. Picone testified that Respondent affirmed that Asplundh cost more than would an internal workforce, although it is unclear from his testimony as to precisely when this was communicated to the Union. (Tr. 263–64.)

filing the underlying charge on February 17, 2016. (See, e.g., Tr. 23, 74, 87, 100; GCX-1(a).)

Throughout the bargaining sessions, and afterwards, Malcarne, the Union's late Business Manager Frank Cirillo, and other Union representatives frequently asked Picone for the requested information. (Tr. 28, 101, 114.) Often, they asked in the form of general questions, but at other times, the questions were more specific. (Tr. 88.) For example, at the bargaining session on December 15, 2015, Cirillo asked Picone for the requested information about contractor names, hours, and costs. (Tr. 24–25.) Cirillo explained that the Union needed the information so that it could craft proposals about Respondent's proposed Response Specialist position. (Tr. 25, 27.) Picone did not ask the Union why it needed the information, nor did he ask how the information would relate to the Union's proposals[13], but simply replied that Respondent was working on getting the information to the Union. (Tr. 28.)

Respondent provided some, but only some, information to the Union on January 6, 2016. (Tr. 89.) As will be explained below, however, the information provided was not a complete response to the Union's requests.

2. The February 1, 2016 Letter

At the bargaining session on February 1, 2016, Cirillo gave Picone a letter dated February 1, 2016 (the "February 1 Letter"). (Tr. 73; JTX-7.) The letter stated, in relevant part: "This is my official second request for contractor information. Please provide the hours and dollars and separate the Troubleshooters. The Union needs this information

[13] Based on the context at the bargaining table, the relevance of the contractor costs to wage proposals was obvious. Since the parties were bargaining over the creation of a new bargaining unit position (i.e., the Response Specialists), it would have clearly been informative for the Union to know how much Respondent had paid over the past few years to have contractors perform work that would be performed by the Response Specialists.

so we can proceed with wage and benefit proposals." (JTX-7.) Upon receiving the February 1 Letter, Picone replied that he understood the request. (Tr. 74.) Picone did not ask any questions about the request, or make any comments about confidentiality, or raise any objections to the request at that time. (Tr. 74.)

During negotiations on February 16, 2016, the Union again asked Respondent about the contractor hours and dollars for the Electrical Maintenance bargaining unit work in order to assist the Union in bargaining over the new position of a Response Specialist in the Electrical Department. (See Tr. 112–13.) As with the "Response Specialist – Linemen," the "Response Specialist – Electrical Maintenance" positions were ongoing and contentious subjects of current and negotiations.[14] (See Tr. 112–13.) According to Malcarne, the Union wanted to know (1) how Respondent planned to staff the positions; (2) whether Respondent planned to use the internal workforce or hire from outside the company to fill the positions; (3) the shift schedule for the new position; and (4) about the "money." (Tr. 113.) Malcarne testified that Picone did not say much in response to the Union's questions, and that Respondent did not provide the Union with the requested information at this time. (Tr. 113.)

Having received no further information from Respondent, the Union filed the instant charge on February 17, 2016.

Respondent did not provide any additional information until March 24, 2016 and later. As will be explained below, the information provided by Respondent was incomplete, erroneous, and often late.

[14] The 2015–16 negotiations were not the first time that the Union and Respondent discussed this kind of work. Around 2013 or 2014, while the Blue and Green Books were still in effect, Respondent and the Union discussed creating a position similar to the Response Specialist position. (Tr. 259, 262.) However, Respondent ultimately decided to contract with Asplundh to do the work, at an admittedly higher cost than using employees to perform the work. (Tr. 262.)

E. Respondent's Responses to Union's Information Requests

Respondent provided the Union with some, but not most, of the information that the Union requested. (Tr. 28.) It appears that Respondent has not disputed the bargaining relevance of any of the information requests in the Union's December 7, December 8, and February 1 Letters, apart from the financial information regarding the *costs* of the contractors. Specifically, during the investigation of this charge, Respondent wrote that: "the only information that the Company has objected to providing is all contactor costs (dollars) of any and all contractors used to perform the work for certain represented classification[s] for 2012–2016." (GCX-16 at 2.)

1. Respondent provided late and admittedly incomplete lists of contractors on March 24, 2016 and April 5, 2016.

During negotiations on March 24, 2016, in response to the Union's requests for contractor hours and cost information (item 1 of the Union's December 7 letter and items 1 and 2 of the Union's December 8 Letter), Respondent provided the Union with a list of contractor names and hours performing the work of Linemen, Electricians, and Storeroom employees. (GCX-4; Tr. 46–47, 49–50, 52.) This was the first information that Respondent provided in response to the Union's requests. (Tr. 22–23.) Unfortunately, the lists were incomplete, as names of several contractors were left off those summaries. (Tr. 48, 53–54, 63.) With respect to the contractors performing the work of bargaining unit Electricians, at least one company (Diversified) was left off the list. (Tr. 48.) Additionally, the electrical contractor summary contains only contractor names and hours for the year 2015, despite the Union's request in the December 8 Letter for the "hours and costs (dollars)" for the years 2012, 2013, 2014, and 2016.

(GCX-4 at 1; JTX-6.) With respect to the contractors performing the work of bargaining-unit employees in the storeroom, the cost of another contractor (Guidant) was missing. (Tr. 52; GCX-4 at 2.) Regarding the contractors performing the bargaining-unit work of Linemen, the summary combined the contractor lists for Linemen and Troubleshooters, missed several names of contractors (e.g., KTI, PAR Electric, and MTV), and excluded all cost information. (Tr. 53–54.)

The Union immediately expressed concerns regarding the inadequacy of Respondent's production. On March 24, 2016, when the Union received the information, the Union's representatives told Picone that information was missing from the summaries. (Tr. 55.) Picone replied that he knew, and that Respondent was still working on completing them. (Tr. 55–56.) At this meeting, Cirillo also asked for the "shit shooter" dollars, referring to the cost of hiring Asplundh, the contractor performing the bargaining-unit troubleshooting work on the second and third shifts. (Tr. 56.)

Then, on April 5, 2016, Respondent gave the Union another summary of names and hours for contractors performing only the bargaining-unit work of electricians for the years 2012 through 2015. (GCX-5; Tr. 62–63.) However, the list of electrical contractor names was still missing at least one contractor (i.e., Diversified). (Tr. 63.) At the April 5, 2016 bargaining session, Cirillo asked for the complete contractor information, and the Union's International Representative Ed Collins also asked for the hours and dollars information of contractors. (Tr. 63–64, 76.) According to Malcarne, Picone replied that Respondent was still working on "the other stuff." (Tr. 64.)

Respondent does not dispute that the list of contractors was incomplete. At the hearing, Picone admitted that Respondent provided incomplete summaries, omitted the

names of contractors who performed bargaining unit work, and excluded the cost information entirely. (Tr. 250–51, 256–57.) The only cost information that the Union received was a general representation that Asplundh cost more to Respondent than using an internal workforce. (Tr. 195, 264.)

Picone testified that Respondent had objected years earlier[15] to providing the contractor cost information because Respondent "felt it was confidential and proprietary." (Tr. 266.)[16] When asked to explain the basis for that feeling, Picone testified that:

> [Picone:] We deemed that as I don't think we should be -- the company felt it shouldn't be in the business of sharing contractor information that could get out. That could put that particular contractor at a disadvantage. We're not really interested in sharing our financial plans or how we conduct our business. We feel that's internal to the company, itself.

(Tr. 267.) When asked why Respondent objected to providing the contractor cost information in 2016, Picone further testified that "On the same grounds as before, confidential and proprietary. They don't feel it's appropriate or proper or the company has an obligation to provide that due to adverse effects for a number of reasons." (Tr. 273.) Picone did not elaborate on those reasons or potential consequences in his testimony, nor does the record reflect that Picone provided any explanation to the Union other than the conclusory invocation of the term "confidential." (Tr. 273.) Nor does it appear that Respondent ever attempted to negotiate a confidentiality agreement or any

[15] The case number of the earlier case is 01-CA-128822.

[16] This testimony was in reference to Respondent's response to an information request in 2014, but appears to apply also to Respondent's rationale in 2016.

other kind of accommodation to address potential confidentiality concerns. (Tr. 23, 101.)[17]

2. Respondent did not provide the Union with the requested fringe benefit breakdown.

It is undisputed that Respondent failed to provide the Union with a fringe benefit breakdown for years 2013, 2014, and 2015, in response to item 3 from the December 7 Letter. (Tr. 251, 290.) A fringe benefit breakdown is a summary of the bargaining-unit benefits and the amount that employees use them. (Tr. 87.) Such breakdowns had been provided to the Union in prior negotiations. (Tr. 294.) At the hearing, Picone testified that production of a fringe benefit breakdown was complicated in 2016 by technological changes to Respondent's electronic recordkeeping system as well as unspecified conflicting priorities. (Tr. 289–91.) Specifically, Picone testified that Respondent was planning to switch from its in-house electronic record keeping system to PeopleSoft, effective June 26 or 27, 2016. (Tr. at 89.) Though it is not clear how this would necessarily affect Respondent's ability to respond to an information request made by the Union more than six months prior to that date, Picone's testimony indicates that other demands placed on the personnel in connection with the change were given precedence over the Union's information request. Specifically, Picone testified that:

> [Picone:] She actually – with going to the new system, and crossovers and stuff like that, we couldn't obtain the information that we used to have, in the format we used to have it. So she came to me a few times, was having difficulty with it. She had pressure from – she doesn't report to me. She's up a different chain of command. There was pressure on her to do the things that she had to do to get the system going. And

[17] This is curious, as it seems that Respondent has shared other information with the Union that it considers "confidential." Specifically, Picone testified that, when he provided the employees' addresses to the Union, "I gave a confidential envelope to both union leadership just for their purposes." (Tr. at 251.)

I basically kind of relieved her of that. I said, hey, if we have to go back to it later, we'll go back to it later. As we sit here today, I don't know if I can produce it the same way we used to produce it, to be honest with you.

[Counsel:] So you don't know if this information would be produced.

[Picone:] At least not, maybe not in a format that we used to go*. I'm sure we could come up with something*.

(Tr. 290; emphasis added.) Thus, Picone did not testify that it would have been *impossible* to provide the Union with the information that it had requested. To the contrary, Picone testified that he thought that the information could be provided, albeit in perhaps a different format than in previous years. (See Tr. 295.)[18] And although Picone testified that he believed that he had provided some kind of explanation to the Union about these technical issues, he could not recall when that might have happened, nor did he say precisely what he told the Union. (Tr. 292.) No such explanation was provided by Respondent during the investigation of the underlying charge. (GCX-16.) There is no evidence that Respondent asked the Union to revise its request or make any other kind of accommodation for any sort of technical difficulties.

3. Respondent provided admittedly inaccurate information about meal reimbursement costs.

During negotiations on January 6, 2016, Respondent provided the Union with the expense plan breakdown, shift premium and Sunday premium costs, and number of meals and meal reimbursement costs in response to items 5, 6, and 7 of the December 7 Letter. (Tr. 88–89; see also GCX-8.) As mentioned earlier, Respondent's response to items 5 and 6 are not at issue; however, it appears that the information provided in

[18] Picone testified, "Now I'm sure obviously if we had to be – I'm sure they have to have it somewhere, so somehow, somewhere we might be able to produce it. And we'd be happy to do that as soon as I can get somebody to do it."

response to request 7 was inaccurate. Specifically, when the Union received the documents, Malcarne told Picone that the summary of meals and meal reimbursement costs looked wrong. Malcarne said that the numbers looked too high, because during that time period Respondent had increased the use of contractors and reduced the number of overtime hours for employees who would have qualified for the meal benefit. (Tr. 89.) Picone replied that he knew and would get back to them later. (Tr. 90.) Unfortunately, Picone never did. (Tr. 90) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the investigation of the underlying charge. (See GCX-16 at 2.)

4. Respondent failed to provide the Union with a list of employees on special rates.

It is undisputed that Respondent did not provide the Union with a list of employees on special rates, which was requested in item 8 of the Union's December 7 Letter. (Tr. 92.) A "special rate" is the wage an employee receives after transferring between positions of differing pay grades. (Tr. 91–92.) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the investigation of the underlying charge. (See GCX-16 at 2.) Malcarne testified that Picone initially told the Union during bargaining that no employees were on special rates, but then the Union later learned that there was, in fact, at least one employee on a special rate. (Tr. 92.) Picone's testimony was slightly different: he did not recall telling Malcarne about an employee on a special rate, but he did not deny that he might have done so. (Tr. 251–52.) Picone testified that there were always employees on special

rates but that he did not provide the Union with this list because it "fell through the cracks." (Tr. 251–52.)

5. Respondent failed to provide the Union with the current working schedules.

Respondent also failed to provide the Union with the current working schedules of bargaining unit employees in response to item 9 of the Union's December 7 Letter. (Tr. 93–94.) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the investigation of the underlying charge. (See GCX-16 at 2.) During negotiations on February 16, 2016, the Union's Vice President and the Assistant Business Agent for Stamford, Johnny Burke, asked Respondent about the current working schedules because of Respondent's frequent scheduling changes. (Tr. 105, 113–114.) However, it is undisputed that Respondent provided nothing in response to this request. (Tr. 252.) Picone also testified that Respondent did not provide the Union with a list of working schedules, and that although Respondent had a policy of posting the schedules in its facilities, he did not verify that the working schedules were otherwise available to the Union by actually being posted in Respondent's facilities. (Tr. 252.) Malcarne testified that Respondent often does not post the current working schedules in the work centers. (Tr. 93–94, 229.)

6. Respondent provided the Union with an incomplete Organizational Chart, which was provided at least four months after the Union's request.

In item 3 of the December 8 Letter, the Union requested copies of Respondent's Organizational Charts. (JTX-6.) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the investigation of the

underlying charge. (See GCX-16 at 2.) During negotiations on April 15, 2016, Respondent provided the Union with an organizational chart dated December 9, 2015. (Tr. 95; GCX-9.) However, the chart contains only one of the 13 existing (at that time) stations for the Line Department, and is missing all 15 Electrical Departments! (Tr. 95–96.) In other words, most of the employees in the Units were omitted from the chart. At the April 15 meeting, Malcarne and Cirillo told Picone that the chart was incomplete and missing the electrical department, most of the line department, meter service, and garage departments. (Tr. 95–96.) Picone replied that it was "the best he could do." (Tr. 96.)

It is not disputed that the organizational chart was incomplete: at the hearing, Picone admitted that the chart was missing a number of departments. (Tr. 253, 304.) Nor does it seem that the timing of Respondent's production of the organizational chart is seriously disputed. Although Picone initially testified that the incomplete organizational chart had been provided at the first bargaining session in December 2015, he later testified that he may have been mistaken about the date of production. (Tr. 304.) After being shown a copy of Respondent's April 1, 2016 Position Statement, he testified that the organizational chart was likely not sent until sometime in April 2016. (Tr. 305; see also GCX-16 at 2.)

7. Respondent provided some, but not all job descriptions, and the descriptions provided were not provided until nearly four months after the Union's request.

In item 4 of the December 8 Letter, the Union requested copies of the job descriptions for employees in the Units. (JTX-6.) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the

investigation of the underlying charge. (See GCX-16 at 2.) Picone testified that Respondent did not provide any of this information to the Union, but Malcarne testified that on or about April 6, 2016, the Union received in the mail a packet of job descriptions, under a cover letter from Gary Martell, Respondent's Labor Relations Consultant and a member of Respondent's negotiating team. (Tr. 98; GCX-10.) The information appears to be missing at least two job descriptions (i.e., Cable Splicers and Troubleshooters). (Tr. 99; 253–54.) Although Picone also testified that it was his belief that the Union would likely have copies of some or all of the job descriptions from prior negotiations, the record contains no evidence that Respondent ever asked the Union what job descriptions it already possessed. (See Tr. 308–09.)

8. Respondent failed to provide manpower requests or PVRs.

Respondent did not provide any information with respect to manpower requests or personnel vacancy requests ("PVRs") in response to item 5 of the Union's December 8 Letter. (Tr. 253–54.) A manpower request or PVR is the first step in a procedure to fill a vacancy in a bargaining unit position. (Tr. 99.) The Union sought this information to make proposals about manpower and minimum staffing levels in each department. (Tr. 99–100, 220–21.) According to Malcarne, the Units have drastically reduced in size in recent years due to employees leaving the company. (Tr. 110.) Specifically, Malcarne estimated that, from 2004 to the date of the hearing, membership in the Units had declined from 850 to 600 members. (Tr. 110.)[19] The Union requested the PVRs to assess whether Respondent intended to fill those positions in addition to informing its proposal about staffing the Response Specialist position. (Tr. 108–09, 111.) Because

[19] Malcarne did not specify whether the figures included members of just the Union or both the Union and Local 457 combined.

the new Response Specialist positions would be open to current Linemen employees to apply, the Union sought the PVRs to evaluate Respondent's likelihood of filling the vacancies in the Linemen Department with new employees, as well as staffing the Response Specialist position with employees, and not contractors. (Tr. 108–09.) There is no evidence that Respondent challenged the relevance of this information at any time during negotiations or the investigation of the underlying charge. (See GCX-16 at 2.) Nonetheless, Respondent did not provide any PVRs to the Union. (Tr. 255, 313.)

F. The Parties' Successor Agreement

By the end of May 2016, Respondent and the Union (and Local 457) agreed on a tentative contract. (Tr. 77.) On June 6, 2016, the bargaining Units ratified the new contract (JTX-3 & JTX-4), called the "Teal Book," which applied retroactively to June 1, 2016. (Tr. 18–19, 77–78.)[20] Under the Teal Book, Respondent agreed to create approximately 81 to 100 Response Specialist positions in the Linemen Department and about 24 Response Specialist positions in the Electrical Maintenance Department. (JTX-4 at 29, 39.) A Response Specialist performs the work of a Troubleshooter in addition to other duties such as testing cables and installing upgrades and replacement parts to electrical equipment. Also, under the Teal Book a Response Specialist services a broader "zone" of Respondent's property than the Troubleshooters' work "area" under the Green and Blue Books (Tr. 34–35.)

[20] Although they are separate exhibits for ease of reference, copies of both JTX-3 and JTX-4 were sent to each of the Unit members prior to the ratification vote. (See Tr. 18–19.) It also bears noting that, at least as of the date of the hearing, the parties were still in the process of reviewing and finalizing the language. (Tr. 234.)

In around August 2016, after the Teal Book went into effect, Malcarne again asked Picone for the requested information. (Tr. 132–33.) Picone replied that he needed to "check with the powers that be." (Tr. 133.)

G. Response Specialist Implementation

On August 3, 2016, Respondent's Director of Systems Operations Control, Richard DeAragon, presented to the Union the Company's plans for implementing the Response Specialist position in the Linemen Department. (Tr. 134.) Malcarne and Picone, among others, were present for this meeting. (Tr. 134.) At the meeting, DeAragon gave a PowerPoint slide presentation and explained how Respondent planned to phase-in the implementation of the new Response Specialist position, and how Respondent intended to measure the success of the Response Specialist organization. (Tr. 135; see also GCX-14.) With respect to measuring performance, DeAragon told the Union that Respondent planned to compare the performance *and costs* of the Union-represented Response Specialists with the prior performance *and costs* of the outside contractors. (Tr. 140–41, 176.) Specifically, DeAragon told Malcarne and the other the Union representatives present that:

- Respondent intended to compare the performance of Response Specialists with the historical performance of the contractors based on the criteria listed on page 10 of the Employer's PowerPoint presentation. (Tr. 136; GCX-14 at 10.)
- Among the factors that Respondent would use to evaluate the Response Specialists were four financial factors—Capital Investment Goals, Maintenance Investment Goals, Capital/O&M Balance, and Overtime. (Tr. 140–41, 145, 147; GCX-14 at 10.)[21]

[21] At the hearing, Counsel for Respondent represented that Capital/O&M Balance refers to Respondent's operating budget, which includes labor costs. (Tr. 175–76; see also GCX-14, 10.)

- If the Union-represented Response Specialists did not compare favorably to the contractors, Response Specialists' work might be given back to the contractors. (Tr. 137, 176.)[22]

During this meeting, the Union asked DeAragon how Respondent planned to compare Asplundh's performance of bargaining unit work with the Response Specialists. (Tr. 140.) DeAragon replied that he had a way to compare the proverbial "apples" and "oranges," but did not reveal his method of comparison to the Union. (Tr. 140.) DeAragon did say that Respondent intended to use the contractor costs for the past two years as part of the analysis. (See Tr. 136, 163.)

Later, on August 8, 2016, the Union and DeAragon met again to discuss the implementation of the Response Specialist positions. (Tr. 148.) DeAragon provided the Union with an updated PowerPoint presentation with changes addressing the Union's feedback from the week before. (Tr. 148–49, GCX-15.) However, on the PowerPoint slide about evaluating the performance of Response Specialists, the column titled "Financials" stayed the same. (GCX-15 at 10.) Labor cost remained a factor for evaluating the performance of Response Specialists as compared with Asplundh's performance of bargaining unit work. (Tr. 150–51.) Just as he had in the prior meeting with the Union, DeAragon did not explain at this meeting exactly how Respondent would compare the labor cost of Response Specialists with the cost of Asplundh's performance.

[22] For replacing an underperforming Response Specialist, Respondent would likely use Asplundh, the company that Respondent had been using for the last two years. (Tr. 137, 143, 147.)

IV. ARGUMENT

A. Legal Standard for Relevance: a Broad Discovery-Type Standard.

An employer has the obligation to provide a union, upon request and in a timely manner, information that is relevant and necessary to its role as bargaining representative. *Woodland Clinic*, 331 NLRB 735, 736 (2000); *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). The standard governing an employer's obligation to produce relevant information is akin to a liberal "discovery-type standard." *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967). Information concerning employees within the bargaining unit is presumptively relevant. *NLRB v. Postal Service*, 888 F.2d 1568, 1570 (11th Circ. 1989); *Int'l Protective Services*, 339 NLRB 701 (2003); *Castle Hill Health Care Center*, 355 NLRB 1156, 1181–82 (2010) (finding that request for work schedules was presumptively relevant). However,

> [w]hen a union's request for information concerns data about employees or operations other than those represented by the union, or data on financial, sales, and other information, there is no presumption that the information is necessary and relevant to the union's representation of employees. Rather the union is under the burden to establish the relevance of such information.

Bohemia, Inc., 272 NLRB 1128, 1129 (1984). Similarly, information about non-unit employees, such as subcontractors, is not presumptively relevant, and the union seeking such information must demonstrate that the information is of probable or potential relevance. *See Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978). When a union requests information related to employees outside the bargaining unit, the burden is on the union to "demonstrate the relevance of the requested information." *Sho-Me Power Electric Corp.*, 360 NLRB No. 53, slip op. at 5 (Feb. 25, 2014) (affirming judge's finding that employer must provide list of contractors, including names, hours

worked, and type of work performed).[23] This is not a high burden: the "broad, discovery-like standard in determining relevance in information requests" also applies to requests in "which a special demonstration of relevance is needed, and potential or probably relevance is sufficient to give rise to an employer's obligation to provide information." *Calmat Co.*, 331 NLRB 1084, 1095 (2000). A union need not articulate specific relevant information in the employer's possession to establish the relevance of the requested information. *Olean General Hospital*, 363 NLRB No. 62, slip op. at 10 (Dec. 11, 2015) (finding that union's failure to identify specific information in requested report did not undercut union's claim that information was relevant). Additionally, a union is "not required to show that the information which triggered its request was accurate or ultimately reliable" and a union's request "may be based on hearsay." *Boeing*, 364 NLRB No. 24, slip op at 2, n. 3 (June 9, 2016), *quoting Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

To trigger the duty to furnish information, the relevance of the information may be apparent under the circumstances. *Disneyland Park*, 350 NLRB 1256, 1258 (2007) *citing Allison Corp.*, 330 NLRB 1363, 1367, n. 23 (2000) ("We also note that an employer is obligated to furnish requested information where the circumstances should put the employer on notice of a relevant purpose which the union has not specifically spelled out."). The Board has recognized that the context of contract negotiations provides a factual backdrop that makes the relevance of subcontracting costs to contract proposals readily apparent. *See e.g., Boeing*, supra, slip op. at 8, 10. In

[23] In upholding the union's information request for certain subcontractor costs, the Board in *Sho-Me Power* found that the union's request was more specific than the request at issue in an earlier case, *Disneyland Park*, 350 NLBR 1256 (2007), in which the Board found that an employer did not have to disclose the requested contractor information. 360 NLRB No. 53, slip op. at 1, n. 1.

Boeing, the Board affirmed a judge's ruling that an employer had an obligation to disclose certain contractor costs, including productivity costs, engineering costs, and engineering overhead, for work that was similar to bargaining unit work and was performed by contractors. *Id.* Boeing had contracted out bargaining unit engineering work and claimed it was willing to pay a higher rate for contracted work due to the quality of the work. *Id.* at 8. The union requested information about the contractor cost information, including the line-item breakout of labor costs, how Boeing calculated the cost of production for the contracted work, and a summary of overhead for each location where this contracted work was being done, among other items. *Id.* The judge found, and the Board affirmed, that Boeing had implied that the union might lose unit work if they did not agree with the company on contract proposals regarding wages, which were "at the heart of the negotiations between the parties." *Id.* at 10. The judge additionally found, and the Board affirmed, that because contractors performed bargaining unit work side-by-side with employees, the contractor rates were directly relevant to collective bargaining and thus must be furnished to the union upon request. *Id.* at 12.

Additionally, in *West Penn Power*, the Board, on remand from the Fourth Circuit, found that subcontracting cost data that a union requested were needed to enable it to determine, both for contract administration purposes and negotiation purposes, the volume of subcontracting engaged in by the company. *West Penn Power Co.*, 346 NLRB 425, 428–29 (2006). The Board noted specifically that the union had showed it needed to ascertain the extent and pattern of the subcontracting that was occurring and that it needed the financial data in order to prepare for the upcoming contract

negotiations. *Id.* at 428; *see also*, *General Electric Co.*, 294 NLRB 146 (1989) (Board found that employer violated Section 8(a)(5) "by refusing to furnish the Union requested information concerning the costs of maintenance work subcontracts" because information was relevant to negotiate successor agreement), *enf. den*. 916 F.2d 1163 (7th Cir. 1990).

In *Connecticut Light and Power Co.*, a case involving the same parties and very similar factual circumstances as the matter at hand, the Board upheld the ALJ, who found that Respondent violated Section 8(a)(5) of the Act by refusing to provide contractor cost information. *Connecticut Light and Power Co.*, 229 NLRB 1032 (1977), *enf. den. in part*, 573 F.2d 101 (1st Cir. 1978).[24] As the judge noted, "the Respondent has consistently refused to furnish cost information on grounds that the Company did not consider cost data relevant for bargaining on the issue of work contracted out." *Id.* at 1033. In 1975, the Union and its sister Local 457 "informed the Company that they would renew their request in advance of 1976 negotiations so that they could submit proposals when and if the information was supplied by the Respondent." *Id.* According to the judge, "the Unions continued to insist that cost data was essential to the issue of the continuity of employment of the members of the bargaining unit, and to the issue of whether bargaining unit employees could perform the work cheaper than the contractors." *Id.* at 1034. The judge decided, and the Board affirmed, that

> on these occasions the Unions fully apprised the Respondent that cost information on contracts was necessary to protect bargaining unit work, and, in order for the Unions to propose and negotiate, this objective cost information was essential to permit the Unions to determine whether bargaining unit employees could perform the work cheaper than the

[24] *But see, Sociedad Espanola de Auxilio Mutuo y Beneficiencia de P.R. v. NLRB*, 414 F.3d 158, 167 (1st Cir. 2005) (recognizing that under *Acme Die Casting*, 315 NLRB 202 (1994), "the NLRA does not require a showing of job loss for subcontracting to be a mandatory subject of collective bargaining.")

> Respondents contractors. Under all the circumstances, I find that Respondent was fully aware of the Unions' needs for the information requested, as it could equally assess that the information was relevant to the bargainable issue of contracting out work.

Id. See also, *Acme Die Casting*, 315 NLRB 202, n. 1 (1994) ("an employer's decision to subcontract is a mandatory subject of bargaining when what is involved is the substitution of one group of workers for another to perform the same work, and not a change in the scope and direction of the enterprise.").

B. An Unreasonable Delay in Providing Information Violates Section 8(a)(5).

Both unions and employers have a duty to timely provide information. *See Woodland Clinic*, 331 NLRB 735 (2001). An unreasonable delay in providing information is a violation of § 8(a)(5). *See*, *e.g.*, *Comar, Inc.*, 349 NLRB 342, 353-354 (2007) (finding that four-month delay for unit information such as employee benefits violated 8(a)(5)). As the judge in *Comar* explained:

> With respect to the information that the Union sought about unit employees, the Respondent does not contest the Union's entitlement and indeed such information is presumptively relevant to bargaining. See *Quality Building Contractors*, 342 NLRB 429, 431 (2004); *Western Massachusetts Electric Co.*, 234 NLRB 118, 118-119 (1978), enfd. 589 F.2d 42 (1st Cir. 1978). Nevertheless, the Respondent did not provide *any* of that information until over 4 months after the Union requested it. An employer's "unreasonable delay in furnishing such information is as much of a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." *Amersig Graphics, Inc*., 334 NLRB 880, 885 (2001); see also *Britt Metal Processing, Inc.,* 322 NLRB 421, 425 (1996), affd. mem. 134 F.3d 385 (11th Cir. 1997); *Leland Stanford Junior University*, 307 NLRB 75, 80 (1992); *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). "Absent evidence justifying an employer's delay in furnishing a union with relevant information, such a delay will constitute a violation . . . inasmuch '[a]s the Union was entitled to the information at the time it made its initial request, [and] it was [the employer's] duty to furnish it as promptly as possible.'" *Woodland Clinic*, 331 NLRB 735, 737 (2000), quoting *Pennco, Inc.*, 212 NLRB 677, 678 (1974). The Board evaluates the reasonableness of an employer's delay in supplying information based on "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical*

> *Center*, 319 NLRB 392, 398 (1995), citing *Postal Service*, 308 NLRB 547 (1992). Id. at 353.

349 NLRB at 353-54. The judge in *Comar* also noted that:

> The Board has consistently found delays of considerably less than four months duration to be unreasonable. See *Pan American Grain Co.,* 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (3-month delay unreasonable); *Bundy Corp.*, 292 NLRB 671 (1989) (delay of 2.5 months violates the Act); *Woodland Clinic*, 331 NLRB at 737 (delay of 7 weeks violates the Act). The Respondent has not identified any cases in which the Board has approved a delay of over 4 months, and certainly none in which the Board excused such a delay where the information sought was not unusually complex, voluminous, or difficult to retrieve.

Id. at 354. See also, *Earthgrains Co*., 349 NLRB 389, 400 (2007) (finding four-month delay in responding to "simple, straightforward information request" for subcontractor data unreasonable).

C. Respondent Violated the Act by Failing to Provide (or Timely Provide) the Information Requested in Union's December 7, December 8, and February 1 Letters.

Here, the Union requested information that directly pertained to the bargaining unit as well as information that the Union showed to be relevant to its role as bargaining representative. The factual and legal disputes are fairly few here. There is no dispute that Respondent provided timely information in response to items 2, 4, 5, and 6 of the Union's December 7 Letter (JTX-5), and thus those requests are not at issue here. Regarding the remaining information requests, with the notable exception of the contractor cost information, Respondent has not disputed the relevance of the requested information. (GCX-16 at 2.)

1. **The Union is entitled to the information requested in item 1 of the December 7 Letter, Items 1 and 2 of the December 8 Letter, and the February 1 Letter, which Respondent unlawfully refused to provide, or failed to provide in a complete or timely manner.**

    a. **The Union established relevance of contractor hour and cost information.**

Item 1 of the December 7 Letter, Items 1 and 2 of the December 8 Letter, and the February 1 Letter requested information regarding the names of contractors hired by Respondent to perform Unit work, as well as information regarding the hours worked, the nature of the contractors' work, and the costs of such contracts. With one exception, Respondent did not assert any objection to the relevance of the contractor information at any time during the negotiations or the investigation of the underlying charge. That one exception is Respondent's objection to providing the costs of the contracted work. The relevance of and Union's need for the contractor cost information should have been apparent to Respondent from the Union's explanations that it needed the information for crafting proposals as well as the context of the parties' contract negotiations. Respondent had, in the past two years, expanded the amount and nature of work being contracted out, and had proposed at the outset of the 2015–16 negotiations to create a new Response Specialist position in the Units to bring much of that work back to the Units. For the Union, concerns over losing more bargaining unit work to contractors were at the heart of the 2015–16 negotiations. The Union requested information that would allow the Union to make intelligent demands and compromises by assessing which vacant jobs were being filled, which benefits Unit members used, what their job involved, when they worked, and what they were making, among other relevant matters. Several times during negotiations, Respondent claimed that the expense of using

Asplundh motivated Respondent to use bargaining-unit members, but did not reveal the cost of using Asplundh. Instead, Respondent insisted on keeping the contractor costs a mystery, thus preventing the Union from knowing at what price the bargaining unit risks losing the chance to regain bargaining unit work from a third-party contractor, Asplundh. The loss of work to Asplundh in 2014 was an inauspicious forebear of what was at stake for the Union in these 2015–16 negotiations. Malcarne testified that one of the stated reasons for negotiating with the Union in 2015–16 about creating Response Specialists positions was that an internal work force would be less expensive. (Tr. 195.) Additionally, as it had in past negotiations, the Union was well within its right to assess Respondent's representation that an internal workforce would be less expensive than the cost of contractors, and to assess the difference in costs in each job category listed in the December 8 Letter, for the logical purpose of formulating intelligent proposals on wages, benefits, minimum staffing, and other proposals.[25]

b. Respondent violated the Act by delaying in providing some of the contractor information and failing to provide the rest.

The evidence reflects (and it is undisputed) that Respondent did not provide the cost data for any of the contractors. It is also undisputed that Respondent did not provide a complete list of the names, hours, and costs of contractors who perform the

[25] Respondent's anticipated defense that contractor costs were not a factor in the 2016 negotiations is belied by the evidence. Regardless of whatever motives Respondent may or may not have had when it originally contracted with Asplundh in 2014, at the time of the 2016 negotiations, both the Union and Respondent were aware (if only generally) that the contractors cost more than it would likely cost to have members of the Units perform the trouble work. (Tr. 195, 264.) Thus, it is not surprising that one of Respondent's first proposals was to "Negotiate a single contract in place of the current Blue and Green contracts and include a Troubleshooter agreement." (GC-17.) Moreover, DeAragon's statements to the Union in August 2016 indicate that comparative costs are one of Respondent's considerations in the implementation and evaluation of the new Response Specialist positions: it would strain credulity to imagine that Respondent considered costs *after* reaching an agreement with the Union, but not when negotiating that agreement in the first place.

work of the Union-represented Troubleshooters, Linemen, or Electricians. Respondent did not provide the costs of the contractor called Guidant that performs the work of storeroom employees. Respondent did not provide any list for contractors performing the work of Meter Service employees or Building Maintenance / Janitorial employees. Moreover, Respondent did not begin to provide any of the information regarding the contractors until March 24, 2016. Respondent provided no explanation as to why it took well over three months to provide any of the information that it belatedly provided.

Respondent has asserted that the cost information is "confidential," but (as explained below), has failed to substantiate its assertions of any confidentiality interest. Respondent also has argued that, even if it violated the Act by failing to provide the contractor cost information, it should not be compelled to produce the cost information to the Union. As explained below, Respondent's defenses are without merit.

c. Respondent's defenses are unavailing.

i. Respondent failed to establish a confidentiality interest in contractor cost information or other confidentiality interest outweighing the union's need for contractor hours and dollars.

During the hearing, Picone appeared to explain that Respondent did not provide the contractor cost information because Respondent considered the information confidential and proprietary. (Tr. 266–67.) However, it is well established that the burden is on Respondent to demonstrate a legitimate and substantial confidentiality interest. *Pennsylvania Power Co.*, 301 NLRB 1104, 1105 (1991). A claim of confidentiality by itself is insufficient to relieve the employer of its duty to disclose relevant information upon the union's request. *Engineers Local 12*, 237 NLRB 1556, 1559, n. 9 (1978); *Illinois-American Water Co.*, 296 NLRB 715, 715 & 724 (1989)

(upholding ALJ's rejection of employer's contention that privacy of employees prevented disclosure because no employees had asked employer to withhold private information from union); *Lasher Serv. Corp.* 332 NLRB 834, 834 (2000) ("Here, by asserting confidentiality, the Respondent assumed the burden of coming forward with evidence to back its position, and it has not done so. Therefore, the Respondent has not established its confidentiality claim.").

Picone's testimony that Respondent viewed the contractor cost information as confidential was vague and conclusory; Picone failed to provide any objective basis on which to conclude that the cost information is in fact confidential. Thus, neither Picone's testimony nor Respondent's conduct at the bargaining table provides any evidence to support Respondent's pleas of confidentiality. There is no evidence that Respondent explained to the Union during negotiations its reasons for treating the contractor information confidential.

First, Respondent had given this kind of contractor cost information during the negotiation of the Blue and Green Books. Respondent did not explain to the Union why the contractor cost information was somehow confidential for 2015–16 negotiations, whereas the same kind of contractor cost information was not confidential for the 2012 contract negotiations.[26] At the hearing, Picone attempted to distinguish the Asplundh contractor cost information by saying that the work was somehow different, but his testimony was conclusory and added no clarity or useful information. (Tr. 333.) Picone testified that "what we're contracting Asplundh to do is different than our typical, hey, go

[26] For example, Respondent has not asserted or attempted to prove that its contracts with Asplundh or any other contractor require Respondent to keep their financial terms confidential.

do this two miles of line and construct this two miles of line. It's just a different animal." However, he did not elaborate further than this statement. (Tr. 333.)

Even assuming that Asplundh's work for Respondent is somehow different from the work other contractors have done for Respondent, that does not explain (1) what it was about those differences that made the Asplundh costs confidential, and (2) why Respondent refused to provide cost information for the contractors other than Asplundh. Moreover, what the record does show about Asplundh's work for Respondent does not appear all that exotic: Malcarne testified that, since Spring 2014, Asplundh had been performing the trouble work on the second and third shifts that Unit members had been performing (and that employees were still performing on the first shift). (Tr. 166–67.)

Moreover, at no point during collective bargaining did Respondent propose a confidentiality agreement to the Union or any other kind of accommodation addressing any possible confidentiality concerns. If an employer has a legitimate and substantial confidentiality concern, the employer must notify a union in a timely manner of the confidentiality concerns and promptly seek to accommodate the union's request. *Postal Service*, 364 NLRB No. 27, slip op. at 2 (June 15, 2016), *citing Olean General Hospital*, 363 NLRB No. 62, slip op. at 6 (Dec. 11, 2015) and *Howard Industries, Inc.*, 360 NLRB No. 111, slip op. at 3 (2014) (even if union requested confidential information, employer violated Act by failing to seek accommodation). Respondent took no such steps during these negotiations.

Furthermore, this is not a case in which an employer asserted an inability to pay or a union requested that an employer open its books. Instead, in this case the Union at first sought certain contractor information to assess how to balance their wage, benefit,

and minimum staffing proposals during collective bargaining, and currently seeks the information to understand Respondent's planned comparison of the labor cost of Response Specialist – Linemen with Asplundh's cost to the company.

ii. Respondent relied on cases on during investigation that are distinguishable from this case

During the investigation, Respondent raised several cases in support of its position (see GCX-16), but these cases are readily distinguishable. Respondent's reliance on *Detroit Edison Co.* (314 NLRB 1273, 1274 (1994)) is misplaced. There, the Board reversed a judge's finding of a violation where an employer refused to provide contractor cost information that the union requested mid-term—not during contract negotiations. *Detroit Edison Co.*, 314 NLRB 1273, 1274 (1994). The Board found, based largely on admissions by the union's representative at the hearing, that the contractor cost information had no potential relevance to administration of the contract or any grievances over any written agreements between the parties and that the requested information had nothing to do with contract negotiations. *Id.* at 1274–75.

Specifically, the Board noted that: "The subcontractor cost data that the Union sought had no apparent connection to either of those (contractual) provisions, and Breen [a union representative] conceded that the Union was not in the process of formulating any 'particular grievance' when it made the information request" and that the union rep admitted that "even if the Union obtained data suggesting that the Respondent was paying more to its subcontractors than it would cost to keep the work in-house, the Union would have no basis for claiming a contract breach." 314 NLRB 1273 at 1274–75. Thus, the Board reasoned, the cost data lacked even *potential*

relevance to grievances over breach of any of the written agreements between the parties." *Id.* Finally, the Board observed that:

> No midterm reopener provision was in evidence; neither party had announced any intention of asking for midterm negotiations; *negotiations for a successor agreement were not due to occur soon, since the contract did not expire until 18 months later—in June 1992*. It is therefore understandable why Breen conceded at the hearing that it was ''correct'' to say that the information request had ''nothing to do with contract negotiations.' In sum, the timing of the request and Breen's testimony makes the finding of relevance on the basis of possible contract modifications insupportable.

Id. (emphasis added). Clearly, Respondent's reliance on *Detroit Edison* was misplaced, as that case relied upon a wholly different factual landscape.[27]

In *Southwestern Bell Telephone Co.*, which was also raised by Respondent during the investigation, the Board adopted the judge's finding that the "probable relevance" of the requested financial information about subcontracting was not demonstrated because the employer never asserted an economic defense for its actions and it was clear that the subcontracting occurred for noneconomic reasons. 262 NLBR 928, 933 (1982) (*Southwestern Bell II*). However, that case solely involved a union's grievance over subcontracting, and not the need for such data to prepare proposals for contract negotiations, as is the case here. [28]

[27] The Board in *Detroit Edison* also distinguished the facts in that case from *General Electric*, supra, noting that General Electric had violated Section 8(a)(5) and (1) by refusing to furnish the union with requested information *in the context of collective bargaining*. *Detroit Edison Co.*, *supra*, 314 NLRB at 1275, n. 9. In *General Electric*, the union's request concerned the costs of maintenance work subcontracts and was for the stated purpose of assisting the union with negotiating a successor agreement. *Id.* Here, like the union in *General Electric*, the Union specifically stated that it needed the cost data to formulate bargaining proposals, and the parties were actively engaged in bargaining a successor contract.

[28] Clearly, the request of information for purposes of processing a grievance presents some different relevance questions that are not applicable during negotiations. Typically, grievances allege a violation of a specific agreement or contractual provision, and the relevance of parties' information requests is often bounded by the terms of the applicable contract. During negotiations, however, there are no such contractual limitations on relevance, as the parties are free to negotiate or renegotiate any mandatory

Another case cited by Respondent during the investigation is *Richmond Health Care d/b/a Sunrise Health*, 332 NLRB 1304 (2000). There, the Board remanded the union's request for certain contractor information because the record, complaint, or motions for summary judgment contained no evidence that the union had ever explained the relevance of the information to the employer. *Id.* at 1305, n. 1. Here, in contrast, the Union clearly explained the relevance of the requested contractor information for creating intelligent proposals, including wage proposals, proposals about the new Response Specialist positions, and proposals about minimum staffing levels.

Respondent also relied upon *Postal Service*, 352 NLRB 1032 (2008),[29] but this case is also easily distinguishable. The judge in *Postal Service* rejected the union's argument that it needed subcontractor information because the employer had relied on its exclusive authority to subcontract delivery routes under temporary contracts. *Id.* at 1036. The parties in *Postal Service*, unlike the parties here, were not negotiating for a new contract at the time of the union's request for information and the purpose for the request was *not* for creating proposals in upcoming negotiations.

2. The Union is entitled to the information requested in item 3 of the December 7 Letter, which Respondent unlawfully failed to provide.

Item 3 from the December 7 Letter ("2013, 2014, and 2015 Fringe Benefit Breakdown") sought information regarding benefits paid to Unit employees, and so it was presumptively relevant to the Union's representational duties. Respondent did not object to the relevance of this information at either the bargaining table or during the

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subject of bargaining (i.e., an employer cannot use the terms of a contract to refuse to negotiate over a mandatory subject of bargaining during successor contract negotiations).

[29] This case was a two-member Board decision later invalidated by the U.S. Supreme Court.

investigation of the underlying charge. Respondent admits that it failed to provide the information to the Union. (Tr. 251, 290.) Although Picone testified that Respondent had technical difficulties in attempting to respond to the Union's information request, Picone did not testify that the information sought by the Union was irretrievable. Rather, Picone explained that he probably could provide the information, although perhaps not in the same format as that information had been presented in prior negotiations. (Tr. 290, 295 Respondent did not attempt to negotiate with the Union regarding possible alternative ways to provide the Union with the information that it needed. (Tr. 292.) Instead, it appears that Respondent simply decided that it had more important tasks to focus on, and "that just got dropped off." (Tr. 291.) Respondent's conduct simply fell short of its obligations under the Act.

3. The Union is entitled to the information requested in item 7 of the December 7 Letter, which Respondent unlawfully failed to provide.

Item 7 from the December 7 Letter ("Number of meals and Meal Reimbursement cost 2013 – 2015") sought information regarding a benefit paid to Unit employees, and so it was presumptively relevant to the Union's representational duties. Respondent did not dispute the relevance of this information at either the bargaining table or during the investigation of the underlying charge. However, Respondent provided the Union with inaccurate or incomplete information. When the Union stated that it believed the information provided was inaccurate, Respondent appeared to agree. Despite this, Respondent never subsequently provided updated or corrected information to the

Union. Respondent provided no explanation as to why corrected or updated information was not provided to the Union.[30] Thus, Respondent's conduct violated the Act.

4. The Union is entitled to the information requested in item 8 of the December 7 Letter, which Respondent unlawfully failed to provide.

Item 8 from the December 7 Letter ("List of all employees currently on special rates – Article V/Red Circle (Blue)") sought information regarding wages paid to Unit employees, and so it was presumptively relevant to the Union's representational duties. Respondent did not dispute the relevance of this information at either the bargaining table or during the investigation of the underlying charge. However, Respondent provided the Union with inaccurate or incomplete information (according to Malcarne's testimony), or provided the Union with no information at all (according to Picone's testimony). Either way, Respondent failed to provide relevant information to the Union. Respondent provided no explanation as to why this information was not provided. Thus, Respondent's conduct violated the Act.

5. The Union is entitled to the information requested in item 9 of the December 7 Letter, which Respondent unlawfully failed to provide.

Item 9 from the December 7 Letter ("Current working schedules") sought information regarding the assignments/hours of work for Unit employees, and so it was presumptively relevant. Respondent did not dispute the relevance of this information at either the bargaining table or during the investigation of the underlying charge. Respondent failed to provide the information. At the hearing, Respondent suggested through its questioning that Respondent posts copies of the working schedules

[30] Assuming, for the sake of argument, that had Respondent investigated the suspicious figures and determined that the information originally provided was in fact accurate, it would still have a duty under § 8(a)(5) to inform the Union that the original information was correct. It does not appear that happened.

(presumably for the employees to see). (Tr. 229, 252.) However, regardless of whatever policy Respondent may have, neither Malcarne nor Picone were able to verify that current working schedules had been posted since 2012. (Tr. 229, 252.) Although Picone testified that Respondent provided "an exhaustive list" to the Union "a few years ago," there is no evidence that Respondent made any effort to verify whether that information was still accurate as of the 2015–16 negotiations.[31] Respondent failed to provide any justification for its failure to provide the information. Respondent's conduct violated the Act.

6. The Union is entitled to the information requested in item 3 of the December 8 Letter, which Respondent unlawfully failed to provide in a complete or timely manner.

In response to item 3 of the December 8 Letter ("Organizational Charts"), the Respondent provided incomplete information. This request sought information regarding the working conditions for Unit employees, and this was presumptively relevant. Respondent did not contest the relevance of this information. The record shows that the organizational chart was not provided until April 2016—four months after it had been requested. Moreover, when the chart was finally provided to the Union, it was missing significant amounts of information (including many of the departments in which a majority of the Union-represented employees were employed). Respondent provided no explanation as to why it took so long to provide the chart, or why a complete chart could not have been provided. Under these circumstances, Respondent's conduct violated the Act.

[31] Had Respondent determined that the previously provided information was still accurate as of the 2015–16 negotiations, Respondent could have fulfilled the Union's request by informing the Union of the information previously provided, confirming the continuing accuracy of that information, and by offering to resend the information if the Union needed it resent. That does not appear to have happened here.

7. The Union is entitled to the information requested in Item 4 of the December 8 Letter, which Respondent unlawfully failed to provide in a complete or timely manner.

Item 4 from the December 8 Letter ("Present Job Descriptions") sought information regarding the work duties and responsibilities of the Union-represented employees, and thus was presumptively relevant. The Respondent provided incomplete information several months after it was requested. Respondent did not contest the relevance of this information during either the negotiations or the investigation of the underling charge. Yet, Respondent did not provide this information to the Union until nearly four months after the Union had requested it. Moreover, when Respondent provided the job descriptions, it did not provide *all* of the job descriptions. Specifically, it failed to provide the job descriptions for Cable Splicers and Troubleshooters. Respondent provided no explanation as to why it took roughly four months to provide this routine information. Although testimony suggested that the Union had been provided with a number of job descriptions in prior years, there is no evidence as to whether Respondent made any effort to determine what job descriptions the Union already had in its possession, and whether those job descriptions were still current as of the 2015–16 negotiations.[32] Thus, Respondent's conduct violated the Act.

8. The Union is entitled to the information requested in Item 5 of the December 8 Letter, which Respondent unlawfully failed to provide.

Item 5 from the December 8 Letter ("All manpower requests for 2012, 2013, 2014, and 2015 (PVR's)") sought information regarding staffing and vacancies in the

[32] Had it determined that the previously provided information still accurate as of the 2015–16 negotiations, Respondent could have fulfilled the Union's request by informing the Union of the information previously provided, confirming the continuing accuracy of that information, and by offering to provide the Union with copies of any job descriptions that it might not have.

Unit, and so it was presumptively relevant. Respondent did not contest the relevance of this information during either the negotiations or the investigation of the underlying charge. Yet, for unexplained reasons, Respondent failed to provide the information, and provided no explanation or justification for that failure. Thus, Respondent's conduct violated the Act.

D. Respondent Has Not Shown that Violations or Remedies are Moot.

Respondent has asserted that the parties' agreement on a successor collective-bargaining agreement has obviated the Union's need for the information, and that even if Respondent were to have violated the Act, it should not be compelled to produce the information. (GCX-1(e) at 3.) This argument ignores the evidence of the Union's continuing need for the information.

The Board most recently clarified the elements of mootness in information request cases in *Boeing*, 364 NLRB No. 24 (June 9, 2016). In *Boeing*, the Board explained that "The employer bears the burden of proof of establishing that the union has no need for the requested information." *Id.* at 4. "Where the employer has demonstrated that the original, stated need for the information is no longer present, the General Counsel or the union—in order to join the issue—must articulate a present need for the information." *Id.* Thus, the execution of a collective-bargaining agreement is insufficient to show that a union no longer needs information that it had requested during collective bargaining if the union has an ongoing need for the requested information. *Id.* at 4, n. 10; *see also*, *Olean General Hospital*, supra, 363 NLRB No. 62, slip op. at 10, n. 16 (even if parties successfully completed negotiations, "that would not obviate the [u]nion's need for the requested information. The duty to bargain does not

cease when negotiations have been completed, and staffing issues and disciplinary concerns may arise during the term of a collective-bargaining agreement.").

Here, there is no evidence indicating that the Union's need for the requested information was eliminated after the contract went into effect. Now that the Teal Book has gone into effect, Respondent asserted that the performance of bargaining unit members will be measured against the cost of using contractors. Specifically, on August 3 and August 8, 2016, DeAragon told Malcarne and other Union representatives that Respondent would be evaluating, among other things, the comparative costs of the Response Specialists with the past costs of the contractors, and that unsatisfactory evaluations could lead to reverting some of the work from the Response Specialists back to contractors. (Tr. 137, 150.) The threat of losing bargaining unit jobs to contractors clearly remains one of the Union's most pressing concerns—as it would be for any union. Even if Respondent does not ultimately act on the threat, Respondent has identified costs as an important issue in implementing and maintaining the parties' new agreement, and so the contractor cost information is as relevant as ever. The Union may use the requested information for monitoring and administering the agreement, especially with respect to the implementation of the Response Specialists. Respondent's plan to compare the performance of the Response Specialist with contractor costs clearly shows an ongoing need for the information. Respondent has represented to the Union that the decision to fill the bargained-for Response Specialist positions will be made, at least in part, based on Respondent's comparison of Response Specialists with the costs of contractors who performed that work in the past two years. Without this contractor cost information, the Union is left to guess how the

performance of the employees they represent will be assessed and at what point an employee is at risk of losing the work to a contractor.

Furthermore, with respect to manpower requests, current working schedules, fringe benefit breakdown, meal reimbursement costs, special rates, a complete organizational chart, and a complete set of job descriptions, Respondent must show that the Union has no need for this presumptively relevant information concerning the wages, hours, and terms and conditions of employment for bargaining unit employees. Although the new contract has gone into effect, there is no evidence showing an absence of union activity regarding any of these topics. There is nothing in the record showing that the Union would have no use for the requested information in monitoring the recent closures of facilities, monitoring the implementation of the changes of the new contract, advancing current grievances, or participating in ongoing arbitrations. The Union has not lost its need for this information, and Respondent has not carried its burden to show otherwise.

V. CONCLUSION

Counsel for the General Counsel respectfully submits that the record evidence supports the Complaint allegations that Respondent violated Sections 8(a)(1) and (5) due to its refusal and failure to meet its obligations to provide the Union with necessary and relevant information during contract negotiations. Accordingly, we respectfully request an order providing for all appropriate relief including production of all the withheld information.

Dated at Hartford, Connecticut this 13th day of October, 2016.

Respectfully submitted,

/s/ Charlotte S. Davis
Charlotte S. Davis

/s/ John A. McGrath
John A. McGrath

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National Labor Relations Board
Region One, Subregion 34
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TABLE OF CASES

CERTIFICATION

The undersigned hereby certifies that copies of the aforesaid brief were caused to be served on October 13, 2016, in the manner set forth below:

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